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THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

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SC Court of Appeals

SCWCC No. 0901585

Carolyn M. Nicholson, Employee, Respondent,

v.

SC Dept. of Social Services, Employer, and
State Accident Fund, Carrier, Appellants.

REPLY BRIEF OF APPELLANTS

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ARGUMENTS

I.

NICHOLSON'S FEBRUARY 25, 2009 INJURY DOES NOT MEET ALL OF THE NECESSARY REQUIREMENTS OF A COMPENSABLE INJURY UNDER THE ACT.

The South Carolina Workers' Compensation Act ("Act") defines 'injury' and 'personal injury' as "only injury by accident arising out of and in the course of employment..." S.C. Code Ann. § 42-1-160(A) (2007). There are three criteria that are required for an 'injury' to be compensable: (1) accident, (2) arising out of employment, **and** (3) arising in the course of employment. *See* Doe v. South Carolina State Hosp., 285 S.C. 183, 328 S.E.2d 652 (Ct. App. 2007)(Emphasis added).

The only issue before this Court is whether Nicholson's injury on February 25, 2009 "arose out of" her employment. SCDSS does not dispute that Nicholson's injury on February 25, 2009 was the result of an "accident" that occurred "in the course of" her employment. Further, as Nicholson noted in her brief, the essential facts of this case are not in dispute. (*See* Brief of Respondent, p. 7). As such, the question of whether Nicholson's injury on February 25, 2009 "arose out of" her employment is a question of law and is for this Court. *See* Williams v. City of Columbia, 218 S.C. 287, 62 S.E.2d 469 (1950)(The question of whether an injury arose out of or in the course of the employment is one of law where the facts are admitted); Jordan v. Dixie Chevrolet, Inc., 218 S.C. 73, 61 S.E.2d 654 (1950)(Upon admitted or established facts the question of whether an accident is compensable is a question of law, and review thereof is not an invasion of the fact-finding field of the Commission on part of the court).

A. This Court's decision in *Creech v. Ducane Co.* is not applicable to the current case.

Like the Commission, Nicholson erroneously relies on this Court's decision in Creech v. Ducane Co., 320 S.C. 559, 467 S.E.2d 114 (Ct. App. 1995) to support her position that she sustained a *compensable* injury under the Act. In Creech, the claimant alleged that he sustained a compensable injury to his back when he reached down to pick up a filter rack from the floor. Id. at 561, 467 S.E.2d at 115. The single Commissioner found, in part:

> The claimant failed to prove that he sustained an injury by "accident" to his back arising out of and in the course of his employment on July 12, 1993. The claimant describes picking up a filter rack weighing less than one pound *but describes no slip, trip, sudden effort, etc.* **Further, the claimant does not describe a hazard to which he is not equally exposed apart from work.**

Id. (Emphasis added). The Full Commission and the Circuit Court affirmed the single Commissioner's decision that the claimant did not sustain an "injury by accident." Id. at 562, 467 S.E.2d at 115. On appeal, this Court cited Stokes v. First Nat. Bank, 306 S.C. 46, 410 S.E.2d 248 (1991), and Sigmon v. Dayco Corp., 316 S.C.260, 449 S.E.2d 497 (Ct. App. 1994), and noted that "no slip, fall or other fortuitous event or accident in the cause of the injury is required; the unexpected result or industrial injury is itself considered the compensable accident." Creech at 563, 467 S.E.2d at 116. As such, the Court held that the lower courts erred as a matter of law in ruling that the claimant did not sustain an "injury by accident" within the meaning of the Act because he failed to establish a "slip, trip, sudden effort, etc." Id. The Court then remanded the case back to the Commission to determine whether the claimant sustained a *compensable* "injury by accident" within the meaning of Stokes and Sigmon. Id.

This Court's decision in Creech only reiterates the fact that an "injury by accident" does not require a causative event and that the injury itself can be an accident. This Court did not address whether the claimant's injury "arose out of" and "in the course of" his employment. Instead, this Court remanded the case to the Commission to determine whether the claimant sustained a *compensable* "injury by accident," i.e. whether it "arose out of" and "in the course of" his employment.

As noted above, the issue in the present case is not whether Nicholson sustained an "injury by accident." SCDSS admits that her injury on February 25, 2009 was an "injury by accident" as defined by the Act and interpreted by the Courts. Rather, the issue is whether Nicholson's injury "arose out of" her employment. Since this Court's decision in Creech does not address the requirement that an injury must arise out of the employment, it is not applicable or pertinent to the present case. As such, Nicholson's reliance on Creech is misplaced and unsound.

B. The facts of the present case clearly establish that Nicholson's injury did not "arise out of" her employment with SCDSS.

An injury "arises out of" one's employment when there is a causal connection between the conditions under which the work is required to be performed and the resulting injury. Stone v. Traylor Brothers, Inc., 360 S.C. 271, 600 S.E.2d (2004). An injury which cannot be traced to the employment as a contributing proximate cause, and which comes from a hazard to which the workmen would have been equally exposed apart from the employment, does **not** arise out of the employment. Douglas v. Spartan Mills, 245 S.C. 265, 140 S.E.2d 173 (1965); Beam v. State Workmen's Compensation Fund, 261 S.C. 327, 200 S.E.2d 83 (1973)(Emphasis added).

In her brief, Nicholson contends that "there can be no question that a claimant sustains a compensable injury by accident arising out of and in the course of employment when she trips and falls while performing her work duties." (Respondent's Brief, p. 11). In support of her position, Nicholson cites Tinley v. Park Hotel & Conv. Ctr. v. Indus. Comm'n, 826 N.E.2d 1043 (Ill. App. 1st 2005), a decision from the Illinois Court of Appeals, as a persuasive opinion. However, the present case is clearly distinguishable from Tinley.

In Tinley, the claimant, a waitress, alleged that she sustained a compensable injury when she tripped on the carpet at the employer's restaurant and fell. Id. at 1044. When the claimant began working at the restaurant, approximately a year before her accident, the flooring was painted concrete with no carpeting. Id. However, two weeks before her accident, carpet was installed at the restaurant. Id. at 1045. The carpet was glued directly to the concrete and no padding was used. Id. at 1046. When asked about the condition of the concrete floor prior to the carpeting being installed, the claimant testified that the concrete was unlevel and had waves in it. Id. at 1045. The claimant also testified that the employer required her to wear "black, closed in, rubber soled shoes." Id. With regards to her accident, the claimant testified: "I tripped on the carpet. When I was walking, my right foot got stuck like on the carpet; and I just went down." Id. She further testified that she did not see any food, liquid, or foreign objects on the carpet before or after her accident and that the carpet did not have any frayed edges or worn spots. Id. Another witness testified that she did not consider the carpet to be flat because there were lumps. Id. at 1046. The witness also testified that she had "noticed several different people stumble" on the carpet. Id.

The arbitrator found that the claimant's injuries did not arise out of her employment, that there was no risk of injury connected with the claimant's employment, and that she was not exposed to a greater risk than the general public as a result of her employment. Id. at 1047. The Commission reversed the arbitrator's decision and found that the claimant's injury arose out of and in the course of her employment. Id. In support of its decision, the Commission noted (1) ***that the concrete floor was uneven and contained waves prior to the carpet being installed on it,*** (2) ***that the shoes the claimant was required to wear would stick to the texture of the carpeting, and*** (3) ***that the newly installed and different working surface increased her risk of injury.*** Id. (Emphasis added). The circuit court affirmed the arbitrator, and the employer appealed to the Appellate Court of Illinois. Id. at 1048.

On appeal, the Court noted that the only issue was whether the claimant's injury arose out of her employment. Id. The employer argued that there were no factual disputes and that the claimant was simply walking on carpet that was clean, flat, and free from defect. Id. However, the Court concluded that there was conflicting evidence regarding the condition of the carpeting; thus, the question of whether the claimant did or did not catch her foot in the newly installed carpeting that posed an increased risk was a question of fact for the Commission. Id. at 1049. The Court specifically noted that the concrete under the carpet was uneven and contained waves, that the shoes the claimant was required to wear contributed to her fall, and that other people had stumbled on the newly-installed carpeting. Id. In affirming the Commission's decision, the Court held that "there was sufficient evidence in the record to support the Commission's determination that the condition of the carpeting caused the claimant to fall" and that "the

record supports a finding that claimant would have been more likely to fall at work than while in her living room." Id. at 1051.

The facts of this case are obviously different from the facts in Tinley. While the employer's floor in Tinley was uneven and contained waves, Nicholson testified that the floor at SCDSS was level and free from defect:

> Q: [Mr. Watson] And it was a level floor; is that right?
>
> A: Yes, sir.
>
> Q: And I think you told me at your deposition that the carpeting was free from defect?
>
> A: As far as I know.
>
> Q: You don't recall seeing anything –
>
> A: No, sir.
>
> Q: – even after your accident that would have caused you to think, "Hey, I might have tripped over that."?
>
> A: No, sir. No debris.
>
> Q: It was just simply level floor, carpeted level floor?
>
> A: Yes, sir.

(R. p. 56, lines 11-22). Additionally, while the employer in Tinley required the claimant to wear "black, closed in, rubber soled shoes," which contributed to her fall, SCDSS did not require Nicholson to wear a certain type of shoe. In fact, Nicholson testified that she was wearing her "normal, regular shoes:"

> Q: [Mr. Watson] And when I asked at your deposition what kind of shoes you were wearing that day, I think you told me just normal, regular shoes.
>
> A: Yes, sir.

(R. p. 56 line 23–p. 57, line 1). Finally, while the Court in Tinley noted that the claimant would have been more likely to fall at work than at another place due to the condition of

the carpet, Nicholson's own testimony shows that her fall could have happened anywhere and that the only thing connecting her fall to her employment was that it happened at work:

> Q: [Mr. Watson]...So it could have happened anywhere?
>
> A: It could have happened anywhere.
>
> Q: All right. Fair enough. The only thing connecting this fall to your employment was that you happened to be at your job at the time; is that right?
>
> A: Yes.

(R. p. 61, lines 2-8).

In Tinley, the claimant's injury was compensable because her employment, specifically the condition of the employer's floor and the employer's required foot wear, presented her with a greater risk of injury than the general public. However, in the present case, Nicholson's injury did not result from the condition of SCDSS's premises, and there is no evidence that the flooring in SCDSS's building was hazardous or defective. Nicholson was not subjected to a greater degree of risk than the general public due to her employment with SCDSS. The general public has the same risk of "frictioning" a foot on a normal, level, carpeted floor and falling. Therefore, Nicholson's injury did not "arise out of" her employment as required by the Act.

Nicholson also argues in her brief that the Supreme Court's decision in Pierre v. Seaside Farms, Inc., 386 S.C. 534, 689 S.E.2d 615 (2010), "casts significant doubt" on SCDSS's argument that her injury is not compensable because it could have happened on any level, carpeted floor at home or in some other place. (*See* Brief of Respondent, p. 12). However, as previously discussed in SCDSS's Brief of Appellants, the Supreme Court's decision in Pierre that the claimant sustained a compensable injury was based on

the fact that "Pierre's accident occurred as a result of a hazard that existed on the employer's premises, i.e., **Pierre slipped and fell on a wet sidewalk just outside of the employees' housing facility.**" (386 S.C. at 548, 689 S.E.2d at 622; *See also* Brief of Appellants, p. 15). While the **wet** sidewalk in Pierre was a hazard on the employer's premises that increased the claimant's risk of injury, Nicholson's own testimony establishes that there was no such hazard on SCDSS's premises that increased her risk of injury. Thus, the Supreme Court's decision in Pierre actually supports SCDSS's position that Nicholson's injury is not compensable because it could have happened on any level, carpeted floor at home or in some other place argument.

Finally, Nicholson also cites Sanders v. Litchfield Country Club, 297 S.C. 339, 377 S.E.2d 111 (Ct. App. 1989), to support her position that "there can be no question that a claimant sustains a compensable injury by accident arising out of and in the course of employment when she trips and falls while performing her work duties." (Respondent's Brief, p. 11). In Sanders, the Commission found that the claimant sustained a compensable injury to her back when she was cleaning up a parking lot, tripped over a bolt sticking out of a "crosstie," and fell. Id. at 340-41, 377 S.E.2d at 112. The Commission's decision was affirmed by the Circuit Court. Id. The defendants subsequently appealed to this Court, which simply held that substantial evidence in the record supported the Commission's decision. Id. at 343, 377 S.E.2d at 113. This Court's opinion in Sanders does not offer an analysis into its reason for concluding that the claimant's injury "arose out of" her employment; however, like Pierre, it is clear that the claimant's injury in Sanders was caused by a hazard that existed on the employer's premises – the bolt sticking out of a "crosstie." *See* 297 at 343, 377 S.E.2d at 113. Once

again, there was no such hazard on SCDSS's premises that increased Nicholson's risk of injury.

Therefore, since Nicholson's employment with DSS clearly did not increase the risk of injury and since there is not a causal relationship between her employment with SCDSS and her injury, Nicholson's accident on February 25, 2009 did not "arise out of" her employment as required by S.C. Code Ann. § 42-1-160.

CONCLUSION

Based on the foregoing and based on the arguments in SCDSS's Brief of Appellants, SCDSS respectfully requests that the South Carolina Court of Appeals reverse the Decision and Order of the South Carolina Workers' Compensation Commission finding that Nicholson sustained a compensable injury by accident arising out of and in the course of his employment with SCDSS.

Respectfully submitted,

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